

NO. 49868-5

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

CHERYL LARRIVA,
Respondent,

v.

DIEGO LARRIVA,
Appellant.

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF ISSUES

1. Under the Domestic Violence Prevention Act, written findings are required only when a protection order is denied. Here, the trial court entered written findings as part of its order and made oral findings of a history of domestic violence. Were the courts findings of fact sufficient?

2. Under Washington Law, evidence of a history of ongoing abuse and the trial court's belief that the petitioner feared future abuse are a sufficient basis to support the entry of a protection order. Here, the trial court found a history of domestic violence and that the petitioner reasonably feared future abuse. Was the entry of an order of protection a proper exercise of discretion?

II. STATEMENT OF THE CASE

Appellant Diego Larriva is the ex-spouse of Respondent Cheryl Larriva. CP 4. The parties have a son and daughter, age 4 and 5. *Id.* After the parties separated, Diego¹ threatened to kill Cheryl. CP 7. Cheryl sought protection orders and Diego was prosecuted in the Gig Harbor Municipal Court for violating a protection order. *Id.*; CP 5, 12. A permanent restraining order entered in the parties' divorce. RP 8.

Despite the existence of the restraining order, Diego continuously harassed Cheryl. On November 15, 2016, Diego told Cheryl that she had two options, "either be with him or he would continue to harass [her] and make [her] life miserable." CP 12. He texted shortly thereafter, "I guess

¹ First names are used for clarity only, no disrespect is intended.

we will see if you are as strong as you say you are.” CP 13. The following day, Cheryl’s license plates were stolen from her car. *Id.* When confronted about the stealing the license plates Diego told Cheryl that the plates would make their way back to her. *Id.* In a later call, he admitted that the plates were hidden near her apartment and apologized. CP 13-14. The license plates were later found in a dumpster near Cheryl’s car. *Id.*

Cheryl contacted the police about Diego’s repeated restraining order violations. RP 8. A police officer advised Cheryl that a protection order would “give her more protection.” *Id.* On November 22, 2016, Cheryl filed a petition for an order of protection. CP 4.

Cheryl’s petition detailed a history of ongoing domestic violence. CP 7-8. When Cheryl initially sought a protection order, Diego threatened to kill her. *Id.* She stated that he threatened her countless times and acted violently whenever she sought help. *Id.* Diego repeatedly violated the dissolution restraining order. *Id.*

She also described stalking behavior in her petition stating, “Diego keeps track of me when I am home or not at home.” *Id.* Diego was once seen jumping out of Cheryl’s window by a neighbor. *Id.* Cheryl stated, “Diego knows I am trying to get help, he has threatened me, I am fearful what he will do because I am seeking help.” *Id.* She described suicidal behavior and threats to set things on fire. CP 8.

Prior to the hearing on Cheryl's petition for an order of protection, Diego filed a declaration denying that he took the license plates and denying that he threatened her. CP 22.

At hearing on December 6, 2016, Cheryl testified that she feared for her safety (RP 2) and that Diego told her that their situation "wasn't going to end well." RP 3. Further, that she had been followed by one of Diego's friends and that Diego had broken into her home. RP 9. She stated that she had been "harassed via text, phone, email." *Id.*

Diego told her that if she would not be with him, "there will be no peace." RP 10. In a later conversation, Diego gave Cheryl an ultimatum, either be with him or he would make her life difficult. RP 10. Diego did not deny these statements at the December 6 hearing, but offered the court excuses as to why his comments were acceptable. RP 11.

During testimony, the trial court stated, "[i]t seems like you have tried to have an awful lot of contact for somebody that has a restraining order." RP 12. Based on the fact set forth in the petition and the testimony of the parties, the trial court found there was a history of domestic violence and entered a protection order for one year. CP 14. The order included the following written findings:

The Court Finds Based Upon the Court Record:

The court has jurisdiction over the parties, the minors, and subject matter. Respondent had reasonable notice and an opportunity to be heard. Notice of this hearing was served on the respondent by personal service.

Respondent was present at the hearing.

This order is issued in accordance with the Full Faith and Credit provisions of VAWA; 18 U.S.C. § 2265.

Respondent's relationship to the victim is spouse or former spouse.

Respondent committed domestic violence as defined in RCW 26.50.010.

CP 40. Diego's appeal followed.

III. ARGUMENT

Review of a trial court's decision to grant a protection order for an abuse of discretion. *In re Parentage of T.W.J.*, 193 Wn. App. 1, 6, 367 P.3d 607 (2016). The Court will not disturb such a decision on appeal, unless the court's discretion was manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. *Id.* Where the trial court has weighed the evidence, the appellate Court's role is to determine whether substantial evidence supports the findings of fact and whether the findings in turn support the conclusions of law. *In re Marriage of Greene*, 97 Wn. App. 708, 714, 986 P.2d 144 (1999). Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the stated premise. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992). The appellate Court will not substitute its judgment for that of the trial court, weigh the evidence, or determine witness credibility. *Greene*, 97 Wn. App. at 714.

Chapter 26.50 RCW authorizes issuance of a protection order if the party seeking it alleges "the existence of domestic violence [] and ...

[declares] the specific facts and circumstances from which relief is sought.” RCW 26.50.030(1). Domestic violence includes physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members. RCW 26.50.010(3). Domestic violence also includes stalking as defined in RCW 9A.46.110 ². *Id.*

Neither an act of violence nor a recent incident of domestic violence is necessary. *Hecker v. Cortinas*, 110 Wn. App. 865, 869-70, 43 P.3d 50 (2002); *Spence v. Kaminski*, 103 Wn. App. 325, 334, 12 P.3d 1030 (2000). Evidence demonstrating a present fear based on past violence is sufficient. *Id.*; *Muma v. Muma*, 115 Wn.App. 1, 6–7, 60 P.3d 592 (2002). As set forth below, substantial evidence supports the findings of the trial court and the court’s findings support the entry of a protection order. The trial court’s order should be affirmed.

² (1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:

(a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and

(b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and

(c) The stalker either:

(i) Intends to frighten, intimidate, or harass the person; or

(ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

A. THE COURT SHOULD AFFIRM BECAUSE THE TRIAL COURT ENTERED WRITTEN AND ORAL FINDINGS

Diego's first assignment of error alleges the trial court erred in failing to make findings of fact supporting the entry of a protection order. However, under the Domestic Violence Prevention Act, written findings are required only when a protection order is denied. RCW 26.50.060(7), .070(6). Further, Diego cites no authority and provides no argument in support of this claim of error. The Court need not consider fleeting or unsupported claims. *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992); *Meyer v. University of Wash.*, 105 Wn.2d 847, 855, 719 P.2d 98 (1986). This claim should be given no weight.

More importantly, the Court did enter findings as to the ultimate facts. The trial court's order states that the court "finds based upon the record" that the court had jurisdiction, the respondent was served and present, and that the respondent committed domestic violence as defined in RCW 26.50.010. This finding, together with the court's oral ruling, is sufficient to indicate the factual basis for the court's order. *See Spence*, 103 Wn.App. at 329-30. Accordingly, the trial court's findings are sufficient and the order should be affirmed.

B. THE COURT SHOULD AFFIRM BECAUSE SUBSTANTIAL EVIDENCE EXISTS TO SUPPORT THE ENTRY OF A PROTECTION ORDER

The trial court's finding that Diego committed domestic violence is supported by substantial evidence. Cheryl supported her petition for a protection order with her own statement, certified under penalty of perjury

under the laws of Washington to be true and correct. In this statement, Cheryl asserted that Diego threatened to kill her after she sought her first protection order and that he threatened her countless times. She testified about Diego tracking her when at home and away. She offered evidence of him breaking into her home. She attached a statement to her petition she made to police detailing threatening text messages and Diego's admission that he removed her car license plates. She identified suicidal behavior and threats of arson.

Cheryl stated in both in her petition and before the trial court that she is fearful what he might do. Her fear was based both on recent acts and the history of Diego's conduct. Evidence demonstrating a present fear based on past violence is sufficient to support the entry of a protection order. *Muma*, 115 Wn. App. at 6–7, (past violence and recent violation of parenting plan gave rise to current fear and supported protection order; a petitioner need not “wait [for] further acts of violence ... in order to seek an order of protection”); *Spence*, 103 Wn. App. at 332–33, (parties' continuing contact while they struggled over custody issues, together with evidence that petitioner continued to be afraid of the respondent, was sufficient to support protection order). Substantial evidence demonstrates both a history of ongoing abuse and Cheryl's reasonable fear of future abuse.

Cheryl also stated that Diego repeatedly violated the restraining order issued in their dissolution and that she sought a protection order on

the advice of police. She told the trial court she believed she needed more protection. This testimony further demonstrates Cheryl's reasonable fear of Diego. See *Maldonado v. Maldonado*, 197 Wn. App. 779, 391 P.3d 546 (2017) (no requirement that victims testify to or voice their fear to establish that violence has made them fearful). Based on the foregoing evidence, the trial court did not abuse its discretion in issuing the order.

While Diego denied some of Cheryl's allegations, he did not deny them all. Further, the trial court had the opportunity to assess the parties' credibility and weigh the conflicting testimony. Based on the petition, Diego's response, and the parties' presentation at hearing, the trial court found that Diego had committed domestic violence and that the order was supported by a history of domestic violence. The appellate Court will not substitute its judgment for that of the trial court, weigh the evidence, or determine witness credibility. *Greene*, 97 Wn. App. at 714. Because the trial court did not abuse discretion, its protection order should be affirmed.

C. THE COURT SHOULD AWARD ATTORNEY FEES AND COSTS PURSUANT TO RCW 26.50.060(1)(g) AND RAP 18.1

Cheryl should be awarded attorney fees and expenses under the Domestic Violence Protection Act's attorney fee provision and RAP 18.1. RCW 26.50.060(1)(g); see *Freeman v. Freeman*, 169 Wn.2d 664, 676, 239 P.3d 557 (2010) (acknowledging that the DVPA authorizes an award of reasonable attorney fees incurred by a protected party seeking an order of protection). The DVPA's fee provision may be extended to the

prevailing party on appeal. *In re Parentage of T.W.J.*, 193 Wn. App. at 6, *Barber v. Barber*, 136 Wn. App. 512, 515, 150 P.3d 124 (2007). The Court should grant Cheryl's request for attorney fees under RCW 26.50.060(1)(g) conditioned on her compliance with RAP 18.1.

IV. CONCLUSION

The trial court's findings of Diego's history of domestic violence was proven by a preponderance of the evidence and supports the entry of a protection order. It is well settled in Washington that a history of ongoing abuse and the trial court's belief that the petitioner feared future abuse is sufficient to persuade a rational person that a petitioner had been put in fear of imminent physical harm. *Spence*, 103 Wn. App. at 333. Such is the case here. Diego's history of threats, his persistent violation of the restraining order, and ongoing harassment of Cheryl presented a threat of an infliction of imminent physical harm that was sufficient to support the issuance of the protection order. The trial court did not abuse its discretion and the order should be affirmed.

Submitted this 22th day of JUNE 2017.

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I certify, under penalty of perjury under the laws of the State of Washington, that I caused to be served, via electronic mail, a true and correct copy of the pleading to which this certification is attached, upon the following:

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June 21, 2017 - 4:21 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49868-5
Appellate Court Case Title: Cheryl Larriva, Respondent v. Diego Larriva, Appellant
Superior Court Case Number: 16-2-03695-9

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